No. 96-267

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. BROOKS,
Petitioner,

v.

GEORGE COUNTY, MISSISSIPPI;
EUGENE HOWELL, Individually and in His Official Capacity as Sheriff of George County, Mississippi;
EARL KOSKELA Individually and in His Official Capacity as District Attorney; WILBUR WARD, Individually and in His Official Capacity as Circuit Clerk of George County Mississippi;
DON PARIMON, JAMES COOPER AND GEORGE MILLER, Individually and in Their Official Capacities as Deputy Sheriffs of George County, Mississippi;
BOARD OF SUPERVISORS OF GEORGE COUNTY, MISSISSIPPI, BEING NORMAN SEDRICK HOWELL, LARRY HAVARD, RALPH FAIRLEY, R. WAYNE CHRISTIAN AND CLYDE W. EUBANKS, SR., Individually and in Their Official Capacities as Supervisors for George County, Mississippi;
UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; and UNITED FIRE CASUALTY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The undersigned counsel of record for George County, Mississippi, Eugene Howell, Sheriff of George County, Mississippi, James Cooper and George Miller, Deputy Sheriffs of George County, Mississippi, and the George County Board of Supervisors, certify that the following listed persons or entities have an interest in the outcome of this case.

1. Robert W. Brooks, Appellee and Cross-Appellant

2. George County, Mississippi, Appellant and Cross-Appellee

3. Eugene Howell, Sheriff of George County, Mississippi, Appellant and Cross-Appellee

4. James Cooper, Deputy Sheriff of George County, Mississippi, Appellant and Cross-Appellee

5. George Miller, Deputy Sheriff of George County, Mississippi, Appellant and Cross-Appellee

6. Don Parimon, Deputy Sheriff of George County, Mississippi, Cross-Appellee

7. Earl Koskela, District Attorney, Nineteenth Judicial District, Cross-Appellee

8. Wilbur Ward, Circuit Clerk of George County, Mississippi, Cross-Appellee

9. William T. Bailey, Sr., Cross-Appellee

10. Board of Supervisors of George County, Mississippi, Cross-Appellee

11. Larry Havard, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

12. Norman Sedrick Howell, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

13. Ralph Fairly, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

14. R. Wayne Christian, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

15. Clyde W. Eubanks, Sr., Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

16. United States Fidelity and Guaranty Company, Cross-Appellee

17. United Fire and Casualty Company, Cross-Appellee

18. David C. Frazier, attorney for Robert W. Brooks

19. David A. Roberts, attorney for Robert W. Brooks

20. Roy W. Pike, attorney for Robert W. Brooks

21. Dan H. Fairly, Walter D. Willson and Wells Marble & Hurst, attorneys for George County, Mississippi, Eugene Howell, James Cooper, George Miller and Don Parimon

22. Gerald A. Dickerson, attorney for Board of Supervisors of George County, Mississippi

23. Geoffrey Morgan, attorney for Earl Koskela and Wilbur Ward

24. American Justice Insurance Reciprocal

TABLE OF CONTENTS

PAGE

LIST OF INTERESTED PERSONS i

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 5

I. The Fifth Circuit's Opinion Does Not Conflict With the Decisions of Other Courts and/or The Thirteenth Amendment to the United States Constitution 7

II. The Fifth Circuit Correctly Ruled That No Legitimately-Recognized Property Interest Protected By the Due Process Clause of the Fourteenth Amendment Exists for Consensual Work Performed on Private Property 21

III. The Fifth Circuit Correctly Held That Sheriff Howell Had No Duty Under Mississippi Law to Periodically Ascertain Brooks' Status as a Pretrial Detainee 26

CONCLUSION 30

TABLE OF CITED AUTHORITIES

PAGE

Cases

Abbott v. Gould, Inc., 443 N.W.2d 591 (Neb. 1989) ... 21

Anderson v. Creighton, 107 S.Ct. 3034 (1987) 10

Baker v. McCollan, 99 S.Ct. 2689 (1979) 25, 27

Barrett v. Miller, 599 So.2d 559 (Miss. 1992) 21, 22

Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974) 7, 9, 10, 20

Borror v. White, 377 F.Supp. 181 (W.D. Va. 1974) 25

Braxton v. U.S., 111 S.Ct. 1854 (1991) 7

Brooks v. George County, 84 F.3d 157 (5th Cir. 1996) 5

Buckey v. County of Los Angeles, 968 F.2d 791 (9th cir. 1992) 24

Butler v. Perry, 36 S.Ct. 258 (1916) 9

California v. Hodari, 111 S.Ct. 1547 (1991) 28, 29

Clark v. Link, 855 F.2d 156 (4th Cir. 1988) 22

TABLE OF CITED AUTHORITIES (continued) PAGE

Daniels v. Williams, 106 S.Ct. 662 (1986) 23, 24, 25

Davidson v. Cannon, 106 S.Ct. 668 (1986) 24

Davis v. Scherer, 104 S.Ct. 3012 (1984) 23

Duckett v. City of Cedar Park, Texas, 950 F.2d 272 (5th Cir. 1992) 27

Durham v. U.S., 91 S.Ct. 858 (1971) 5

Ellis v. Dixon, 75 S.Ct. 850 (1955) 23

Garcia v. Reeves County, Texas, 32 F.3d 200 (5th Cir. 1994) 22

Gregory v. City of Rogers, Arkansas, 974 F.2d 1006 (8th Cir. 1992) 24, 25

Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982) 10

Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982) 26

Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) 22

Mitchell v. Forsythe, 105 S.Ct. 2806 (1985) 10

Murray v. Miss. Dept. of Corrections, 911 F.2d 1167 (5th Cir. 1990) 8

TABLE OF CITED AUTHORITIES (continued) **PAGE**

Plaisance v. Phelps, 845 F.2d 107
(5th Cir. 1988) 8

Porter v. City of Detroit, 639 F.Supp. 589
(E..D. Mich. 1986) 25

Rochin v. California, 72 S.Ct. 205 (1952) 25

Terry v. Ohio, 88 S.Ct. 1868 (1968) 28

Turner v. Unification Church, 473 F.Supp. 367
(D.C. R.I. 1978) 8, 20

U.S. v. Mendenhall, 100 S.Ct. 1870 (1980) 28, 29

United States v. Kozminski, 108 S.Ct. 2751
(1988) 7, 11, 13, 20

United States v. Shackney, 333 F.2d 475
(2nd Cir. 1964) 9, 13, 19

Watson v. Graves, 909 F.2d 1549
(5th Cir. 1990) 8, 9, 14

Wendt v. Lynaugh, 841 F.2d 619
(5th Cir. 1988) 8

TABLE OF CITED AUTHORITIES (continued) PAGE

Constitution, Statutes and Rules

Thirteenth Amendment 4, 5, 7, 8, 10, 18, 19, 20

Fourteenth Amendment 4, 5, 21, 22, 23, 24, 25

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 1

28 U.S.C. §1331 1

42 U.S.C. §1983 ..... 1, 21, 22, 24, 25, 26, 29

Miss. Code Ann. §47-1-13 (1972) 18, 22, 23, 25

Miss. Code Ann. §47-1-21 (Rev. 1993) 23, 26

Miss. Code Ann. §97-9-37 (Supp. 1996) 29

Mississippi Constitution Art. 10 §226 22

Supreme Court Rule 10.1 ..... 5, 6

Statement of Jurisdiction

The district court had subject matter jurisdiction of this matter, pursuant to 28 U.S.C. §1331, inasmuch as the claims and cause of action arose under and pursuant to the laws of the United States, specifically, 42 U.S.C. §1983. The United States Court of Appeals for the Fifth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. §1291, since a final judgment and an amended final judgment were entered on June 20, 1994, and July 7, 1994, respectively. This Court has jurisdiction to entertain the instant petition for writ of certiorari pursuant to 28 U.S.C. §1254(1).

Statement of the Case

Robert W. Brooks (Brooks) was initially indicted by a grand jury of George County, Mississippi on October 29, 1990, for the separate offenses of grand larceny and felony burglary.[1] At the time the indictments were returned and the capias issued for his arrest, Brooks, out on bond, had fled the state of Mississippi and was located in Virginia. Brooks was thereafter arrested by law enforcement authorities in the state of Virginia who notified the George County, Mississippi Sheriff's office of his arrest. Between the indictments and his arrest, another felony warrant issued for Brooks on the charge of automobile theft. (R.Vol.IXp.422). Eugene Howell, Sheriff of George County, Mississippi (Sheriff Howell), traveled to the state of

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[1]Brooks had previously pled guilty to felony burglary on December 9, 1986, in the state of Virginia, as a result of which he was sentenced to three years in prison. (R.Vol.IIp.427).

Virginia and arrested Brooks on the auto theft charge, and returned him to the state of Mississippi. (R.Vol.IXp.422-423). On January 21, 1991, Brooks was incarcerated in the George County jail. (R.Vol.VIIIp.168). Brooks was arraigned on the indictments for grand larceny and felony burglary on January 28, 1991. (R.Vol.VIp.1580-1582;Vol.IXp.430).

Without notice to anyone, on February 4, 1991, by order of the Circuit Court of George County, the two felony indictments returned against Brooks were dismissed by an order of nolle prosequi. The order of nolle prosequi was presented to the court by the Assistant District Attorney, Gary Evans, and was executed by Circuit Judge Clinton E. Lockard. (R.Vol.IXp.431). This transaction took place in Judge Lockard's chambers in Jackson County, Mississippi. The order was then transmitted to the Circuit Clerk of George County and placed in Brooks' court file. (R.Vol.IXp.432). Brooks was not notified of the order of nolle prosequi; nor were Sheriff Howell or his Deputies. (R.Vol.IXp.436,432). Brooks discovered the entry of the order while perusing his court file on October 1, 1991. (R.Vol.Xp.607). Brooks presented a copy of the order to Sheriff Howell, who immediately released him from jail. (R.Vol.Xp.607).

In March, 1991, during the time period in which he was confined in the George County jail, Brooks requested and was granted trusty status. (R.Vol.IXp.442,608). Brooks specifically asked that he be made a trusty. (R.Vol.Xp.689). As a trusty, Brooks was not locked down in his cell, but was, instead, allowed the freedom to roam in and out of his cell, Sheriff Howell's office, the jail, and the surrounding grounds area. (R.Vol.IXp.447). Brooks even used Sheriff Howell's

personal shower, not the shower in the common area used by other inmates. (R.Vol.VIIIp.280). While incarcerated, Brooks performed, at his own request, various services for Sheriff Howell, George County and others, including several charitable or benevolent organizations, such as the Red Cross, a local VFW Post, an area Little League ballpark, and the George County Community Work Center, among others. (R.Vol.IXp.492;Vol.Xp.612,620). Brooks performed these services on public property as well as private property. Brooks performed these services for two reasons. First and foremost, he was able to secure his release from jail during the day. (R.Vol.Xp.609). Secondly, Brooks earned extra money by working on the outside. (R.Vol.VIIIp.276). Brooks was not compensated for those services he performed on public property, but was, in several instances, paid money or received property and/or goods in exchange for those services he performed on private property. (R.Vol.VIIIp.275). The servitude of Brooks on each and every occasion, was entirely voluntary and was accomplished at his own request in order to secure his release from confinement. (R.Vol.Xp.688-689,694-695).

Shortly after his release from confinement, Brooks filed a complaint in the United States District Court for the Southern District of Mississippi, Southern Division, on July 1, 1992, alleging various and sundry violations of his civil rights, seeking $6,500,000 in damages. (R.Vol.Ip.1). During the discovery phase, Brooks filed an amended complaint on March 29, 1993, adding several additional parties and increasing the amount he demanded to $17,000,000. (R.Vol.IIp.392).

On motions for summary judgment filed by all parties, the lower court denied Brooks' motion for partial summary judgment in its entirety, but granted, in part, Respondents' motion for summary judgment with respect to Brooks' claim of unlawful incarceration, Brooks' pendent state law claims of negligence and false imprisonment, and Brooks' claim for punitive damages in Respondents' official capacities. (R.Vol.VI p.1608,1646).

After a five-day trial, the jury returned a verdict for Brooks on April 26, 1994, against Sheriff Howell, James Cooper and George Miller, Deputy Sheriffs of George County, (the Deputies), and George County, awarding compensatory damages in the amount of $70,000, $50,000 of which represented damages concerning Brooks' claim of involuntary servitude under the Thirteenth Amendment, and $20,000 representing lost wages in connection with Brooks' due process claim under the Fourteenth Amendment. (R.Vol.VIIp.1763). The following date, in a bifurcated proceeding, the jury awarded punitive damages against Sheriff Howell and Deputy Miller in their individual capacities in the amount of $5,000 and $500, respectively. (R.Vol.VIIp.1770). A judgment was entered against Sheriff Howell and his Deputies on June 20, 1994. (R.Vol.VIIp.1777). An amended judgment was thereafter entered on July 7, 1994, to include George County as a judgment debtor. (R.Vol.VIIp.1809).

Respondents timely filed a notice of appeal on September 6, 1994, thereby perfecting their appeal to the United States Court of Appeals for the Fifth Circuit. (R.Vol.VIIp.1926). Brooks then filed a cross-appeal with respect to the district court's granting of partial summary

judgment regarding his claim of unlawful incarceration, his pendent state law claims and punitive damages in Respondents' official capacities, and full summary judgment to the other litigants on each of Brooks' claims. (R.Vol.VIIp.1935).

This matter was argued orally before the Fifth Circuit on November 6, 1995. Several months later, the Fifth Circuit rendered its opinion, which reversed and rendered the jury award premised upon involuntary servitude under the Thirteenth Amendment, and reversed and rendered that portion of the jury award concerning work on private property under the Fourteenth Amendment. The Fifth Circuit affirmed the district court's granting of summary judgment on behalf of the Respondents on Brooks' claim of unlawful incarceration.

The opinion of the Fifth Circuit that gives rise to Brooks' petition for writ of certiorari is published at 84 F.3d 157 (5th Cir. 1996), and is reprinted in full in appendix A to Brooks' petition for writ of certiorari.

Argument

As this Court is well-aware, the granting of a writ of certiorari is not a matter of right, but is wholly discretionary and will be granted only where there are special and important reasons therefor. Sup.Ct.R. 10.1; Durham v. U.S., 91 S.Ct. 858, 860 (1971). The generally-accepted reasons for granting a petition for writ of certiorari include the following:

(a) a United States court of appeals has entered a decision in conflict with the decision

> of another United States court of appeals on the same important matter...;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup.Ct.R. 10.1.

A petition for a writ of certiorari is rarely, if ever, granted when the asserted error consists of nothing more than erroneous factual findings or the misapplication of a properly stated rule of law. This is the essence of Brooks' petition for writ of certiorari in this case. Indeed, Brooks has utterly failed, as will be more fully demonstrated hereinbelow, to demonstrate even a colorable conflict between the Fifth Circuit and an opinion of any other court of appeals or, for that matter, with any ruling of this Court. Furthermore, Brooks' contentions before this Court do not involve an important question of federal law, but, at best, involve nothing more than the interpretation of Mississippi statutory and common law, and whether a claim was stated thereunder.

In essence, Brooks is dissatisfied with the Fifth Circuit's opinion, which reversed and rendered most aspects of this case in Respondents' favor. Be that as it may, dissatisfaction with the Fifth Circuit's opinion does not warrant special review by the United States Supreme Court. Braxton v. U.S., 111 S.Ct. 1854, 1857 (1991).

I.

The Fifth Circuit's Opinion Does Not Conflict With the Decisions of Other Courts and/or The Thirteenth Amendment to the United States Constitution

Brooks' principal claim at trial and on appeal was that he was coerced or forced to work while incarcerated in the George County jail. Based upon this alleged compulsion, Brooks claimed that Respondents allegedly violated his Thirteenth Amendment right to be free from involuntary servitude. Having failed to secure relief below, Brooks now contends that the Fifth Circuit's opinion, as published at 84 F.3d 157 (5th Cir. 1996), directly conflicts with the Eighth Circuit's ruling in Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974), and is supposedly contrary to this Court's pronouncement in United States v. Kozminski, 108 S.Ct. 2751 (1988). (Pet. at 13). Moreover, Brooks contends that the Fifth Circuit's ruling concerning involuntary servitude is directly contrary to the Thirteenth Amendment to the United States Constitution. Id. at 13.

The Thirteenth Amendment to the United States Constitution provides that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party

shall have been duly convicted, shall exist within the states or in any place subject to their jurisdiction." U.S. Const., Amend XIII. The Fifth Circuit defines involuntary servitude as "an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement." Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990). "When the employee has a choice, even though it is a painful one, there is no involuntary servitude. A showing of compulsion is thus a prerequisite to proof of involuntary servitude." Id. at 1552.[2] The definition of involuntary servitude articulated by the Fifth Circuit comports with that of other jurisdictions. See, e.g., Turner v. Unification Church, 473 F.Supp. 367 (D.C. R.I. 1978). Indeed, the Second Circuit utilizes an identical standard, defining involuntary servitude thusly:

> But a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement, in Mr. Justice

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[2]Brooks contends that Watson is inapplicable since Brooks was a pretrial detainee and not a convicted felon. This is simply wrong. Those convicts sentenced to hard labor and those persons convicted under laws which allow for labor as a part the punishment lose their Thirteenth Amendment protection. Murray v. Miss. Dept. of Corrections, 911 F.2d 1167, 1168 (5th Cir. 1990); Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988); Wendt v. Lynaugh, 841 F.2d 619, 620-21 (5th Cir. 1988). Pretrial detainees have and retain the protection of the Thirteenth Amendment. Watson, although a convicted felon, was not sentenced to hard labor, and, therefore, retained his Thirteenth Amendment rights. Watson, 909 F.2d at 1552. Therefore, for purposes of a Thirteenth Amendment analysis, Brooks and Watson are on equal footing, each protected under the cloak of the Thirteenth Amendment.

> Harlan's language, "superior and overpowering force, constantly present and threatening," [citation omitted] not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad.

United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964). Undoubtedly, it is difficult to prove a true case of coercion or compulsion since, as this Court noted almost eighty years ago, involuntary servitude is considered to be "something akin to African slavery." Butler v. Perry, 36 S.Ct. 258, 259 (1916).

Brooks' contentions that the Fifth Circuit's ruling in this case and in Watson are contrary to Bell are misplaced. In fact, a good argument can be made that Bell is not even applicable to Brooks' claims.

Like Brooks, Bell claimed he was subjected to involuntary servitude, because he was, he claimed, compelled to work as a pretrial detainee. The warden offered to allow Bell to work rather than be placed in administrative segregation. The plaintiff was told he would not be paid for his work. Bell worked for a short period, then refused to obey a work order, and was placed in punitive segregation where he remained until his release. Id. at 1254. The appellate court affirmed the trial court's refusal to award the plaintiff damages. Id. at 1254.

The confusion over what Bell stands for is easily understood. The trial court in Bell found that Bell was not a true volunteer, based upon what he believed was a deficiency in the

work paper signed by the plaintiff. The warden did not appeal this finding, "a conclusion unchallenged by the defendant." Id. at 1254. Thus, from a precedential viewpoint, the case is meaningless because, on the issue of whether the facts constituted involuntary servitude, there was nothing before the court. While at first blush the case seems to say that mere confinement can be sufficient coercion, deeper analysis reveals something much different. For one thing, Bell was placed in administrative or punitive segregation. Brooks was never placed in administrative segregation or, as it is sometimes known, "solitary confinement." Moreover, it is important to note what was not before the court in Bell. The appellate court was not asked to review the record to determine whether there was sufficient evidence to constitute a Thirteenth Amendment violation. As stated, the court noted that the warden did not appeal that lower court finding. Additionally, this decision predated the standard-bearing qualified immunity decisions of Anderson v. Creighton, 107 S.Ct. 3034 (1987), Mitchell v. Forsythe, 105 S.Ct. 2806 (1985), and Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

If Bell impinges on the case at bar at all, it is more likely favorable to the Respondents. "With reference to the petitioner's charge the warden had forced him to work, . . . the record supports, that as a result of warden's conference with the petitioner, the warden reasonably believed the petitioner wished to work rather than remain idle." Id. at 1254. Much the same can be said of Sheriff Howell and his Deputies in this case.

Brooks compares his situation to that of the claimants in U.S. v. Kozminski, 108 S.Ct. 2751 (1988). In Kozminski, this Court affirmed the conviction of Kozminski, who was

charged with a violation of a federal criminal statute. However, the case reveals facts much more egregious than those presented by Brooks. Kozminski took two men in their 60s with intelligence quotients in the 60s and put them to work on his dairy farm. The men, who were paid little or nothing, were subjected to physical and verbal abuse. The defendant ordered the men not to leave the farm. On several occasions, the men did leave, were picked up and brought back. Kozminski isolated the victims from relatives, friends and even other farm-hands. Without proper food and nutrition, the men were found in poor health. They were forced to live in squalid conditions. Id. at 2755-2756. This factual scenario is diametrically opposite of that experienced by Brooks. Kozminski reveals facts the record in the instant case does not begin to approach.

It is intellectually dishonest to compare Brooks' situation to that of the victims in Kozminski. The plaintiffs in Kozminski were persons of less than normal intelligence who, in the autumn of their lives, were placed on a farm, subjected to physical and verbal abuse, were picked up and brought back when they left the farm, were isolated from their relatives, friends and other farm hands, were not properly fed or housed, and were forced to live in horrible conditions and poor health. Nothing even close to this was experienced by Brooks. As this Court noted in Kozminski, "we hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude." Id. at 2765. The Fifth Circuit's opinion in this case is far from contrary to this Court's ruling in Kozminski.

A review of the record in this case demonstrates that Brooks was never forced or compelled to do anything. The record is replete with instances where Brooks acknowledged that he requested to work and was not forced, ordered or compelled to work. For example, Brooks admitted on cross-examination that he requested to work in order to get outside:

Q Nobody in jail wants to be in jail, do they?
A Right, no, sir.
Q So the getting out is something that's done to make life easier for you, true?
A Yes, sir.

****

Q And that's what you asked for in this case, isn't it?
A I asked to get outside, yes, sir.
Q You wanted to be a trusty.
A Want to, yes, sir, get out of my cell.
Q All right. And you know-- you know enough about jails and the way things work in the jail that the sheriff isn't going to just let you out and let you just sit on the sidewalk, is he?
A No, sir.

****

Q Now, you testified earlier that your brother, Dale went to Mr. Cooper and asked him to let you get out and work some.
A Yes, sir.
Q Is that correct?
A Yes, sir.

Q Did you ask Mr. Cooper?
A Yes, sir. After Cooper come back there, he asked me did I-- he said, would you like to get out and do some work around here and I said, yes, sir.
Q Okay. Mr. Cooper didn't make you do that, did he?
A No, sir.
Q You wanted to do it, didn't you?
A Yes, sir, I wanted to get out of my cell.
Q And you wanted to get out and work.
A I wanted to get out of my cell, you know, if I had to work to do it, that's--
Q You were willing to do it.
Q Yes, sir. It wasn't that big of a deal to you.
A No, sir.

(R.Vol.Xp.688-689,694-695).

The above passages from Brooks' own testimony demonstrate that the evidence, at best, shows that Brooks, in a desire to obtain freedom from his cell, asked to perform tasks and jobs for Sheriff Howell and his Deputies. Given this testimony, there is no conceivable scenario under which Brooks could demonstrate the requisite force or compulsion required by Watson, Kozminski, or Shackney. Interestingly enough, Brooks' court-appointed attorney testified that Brooks told him he did not want to get out of jail, since Brooks presumably wanted to accrue time in county jail toward his expected prison sentence. Brooks' counsel, William Bailey, was so surprised by this announcement that he had Brooks put it in writing. (R.Vol.Xp.779; Ex. D-12). While Brooks denied that this

conversation took place, he did not dispute that the document in question (Ex. D-12), which bore the words, "Don't want to get out of jail," contained his signature. (R.Vol.Xp.698-700).

The position Brooks was in is no different from the plaintiffs in Watson. Brooks requested to be let out of his cell to do some work, sending his brother Dale, a fellow inmate, to Deputy Cooper as his intermediary.[3] (R.Vol.Xp.608,695). In Watson, "...both (plaintiffs) testified they requested work outside the jail and took work release whenever possible." Id. at 1552. On direct examination at trial, Brooks testified that he wanted to be a trusty and that he wanted to get outside. (R.Vol.Xp.609). The same was true for the plaintiffs in Watson. Brooks claimed, notwithstanding his acknowledgment and admission that he requested all of his work, that it was understood by him that, if he had not performed the labor, he would have been returned to his cell. ("If we didn't do the work, you know, I just had the basic understanding that I was going back to my cell." (R.Vol.Vp.720).

For this Court to fully appreciate the setting in which Brooks found himself, further examination of the record is necessary. Brooks was allowed freedoms and privileges broader and more liberal than any other inmate. Brooks took his showers in the Sheriff's personal shower, not in the ones used by the other inmates. (R.Vol.VIIIp.280). He would ride

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[3]Brooks' brother and alleged co-conspirator, Dale Brooks, had previously pled guilty to the offenses of felony burglary and grand larceny, and was in the George County jail awaiting sentencing and transfer to the state penitentiary at Parchman. (R.Vol.Vp.1228).

in a patrol car with narcotics agents while they were out working. (R.Vol.Xp.704). He would ride with Deputy Tanner while Tanner was out serving papers. (R.Vol.Xp.704-705). He even rode some with a Lucedale city policy officer, Ronnie Lambert. (R.Vol.Xp.705). Chief Deputy Miller and Brooks lifted weights together at a makeshift weight room at the old school superintendent's building across from courthouse. (R.Vol.IXp.376). Brooks "worked out" with weights two nights per week. (R.Vol.Xp.706). Brooks was later provided a key to the "weight room" so that he could, when Miller was unavailable, lifts weights on his own. (R.Vol.IXp.378). Miller loaned Brooks his radio so Brooks would have music while he was in his cell. (R.Vol.IXp.380-381). Brooks and Miller even went jogging together one time. (R.Vol.Xp.706).

The record is utterly silent as to any abuse, physical or otherwise, subjected on Brooks to make him work. Not once did Brooks imply or insinuate that physical, mental or emotional harm was done to him to encourage him to work. More to the point, Brooks never said that the Respondents slapped, kicked, beat or struck him. He did not say he was cursed or belittled. He does not claim that the Respondents mistreated him in any way. Nothing is present in the record to show that Brooks worked out of fear of abuse, mistreatment or physical or emotional pain. The record does not reveal that Brooks worked for any reason other than a personal desire to be outside his jail cell. On each occasion when asked about why he worked, Brooks stated that he did so because work gave him the opportunity to get out of the jail (e.g. "Q. Okay. Now from the standpoint of the cookout issues, why would you do this? A. So I could get out of jail". (R.Vol.Xp.621). "Q. All right.

Why would you want to be a trusty? A. To get out -- to get outside. I didn't like the jail." (R.Vol.Xp.609).

Brooks had a choice. He may not have found the options pleasant ones; nevertheless, he had a choice. Brooks could have simply stayed in jail had he not wanted to work. Brooks' decision to work was his own. Nothing these Respondents did or did not do motivated him to work. There was no substantial evidence upon which to arrive at any other conclusion, and the Fifth Circuit correctly so found. The above facts demonstrate one simple, clear concept. Brooks had as free a run of the George County jail as any outsider could imagine. He enjoyed freedoms and liberties not had by others. He took full advantage of all opportunities to gain freedom out of the jail. Given this, it is incomprehensible that this environment, this surrounding, this atmosphere could cause Brooks to believe he had no way to avoid continuing to work. Reasonable minds simply could not differ in this regard, and the Fifth Circuit properly so held.

It requires no citation of authority to state that, during his confinement, Brooks had only one right - to stay confined in his cell (absent release on bond and subject to certain constitutional restrictions not pertinent here). These Respondents were under no obligation to allow Brooks the freedoms he enjoyed. Moreover, Sheriff Howell was under no duty at all to afford Brooks the opportunity to work outside his cell. It offends and defies all notions of common sense to say that Brooks somehow had the right to be outside the jail when, as everyone believed, he was awaiting trial on two felony indictments. Brooks claims his treatment was tantamount to slavery because, he says, if he did not work, he would have been

placed in his cell. Such an argument presupposes that Brooks had some right superior to that had by all other persons arrested and awaiting trial. Implicit in Brooks' argument is that he had the right to be free and roam around when then the sole purpose of his being incarcerated there was to hold him until his trial. This was the only place he had the right to be. Sheriff Howell was not obliged to release Brooks or let him out of jail. Brooks, through his testimony, acknowledged this:

Q Let me see if I can say it where-- I think you and I will understand each other. The only-- you didn't have a right to be a trusty; do you agree with that?
A Yes, sir.
Q The only thing that you had the right to do was to stay in that cell. That's true, isn't it?
A Yes, sir.
Q That is, if you couldn't make bond. Do you agree with that?
A Yes, sir.
Q You know how this process works, if you're arrested you go to jail and your bond set and if you can make that bond then you get out, correct?
A Yes, sir.
Q So that your getting out of jail is something that's done as a favor to you. Do you agree with that?
A Yes, sir.

(R. Vol. X p. 687-688).

Brooks' counsel agreed that this was the only right Brooks had. "Unfortunately, the sheriff was absolutely right, he has a right to sit in jail or make a bond." (R.Vol.Xp.758). Indeed, release from jail to work is a decision contingent upon the discretion, and, to a large extent, the grace of the sheriff. Sheriff Howell could have elected to allow or disallow Brooks to work outside the jail under the authority of one or more statutes. For example, Miss. Code Ann. §47-1-13 (1972), provides that any person in jail awaiting trial for non-violent offenses may be allowed to work on county public works, if the sheriff deems it proper. The sheriff is not obligated, mandated, or required to allow a prisoner to work.

Admittedly, this case is complicated by the fact that during the time Brooks was out of jail working, no criminal charges existed. However, for purposes of a Thirteenth Amendment analysis, for purposes of determining whether Brooks was compelled to work, for purposes of deciding whether the facts of this case constitute involuntary servitude, it simply makes no difference. First, it is uncontradicted that no one holding Brooks, even Brooks himself, knew of the existence and entry of the order of nolle prosequi. The trial court so found. (R.Vol.VIp.1629). It would be unconscionable and patently unjust to hold Sheriff Howell accountable with the knowledge of the order when he had positively no notice of its entry. Second, the trial court ruled, in deciding the numerous motions for summary judgment, that Sheriff Howell had no legal liability to Brooks because of the entry of the order. (R.Vol.VIp.1627-1629). How, then, could this one factor, the entry of the order, convert this case from one not violative of the Thirteenth Amendment to one that is, when both courts below specifically held that the entry of the order imposed no

liability on the Respondents? To reverse the Fifth Circuit regarding the Thirteenth Amendment feature of this case, this Court will have to fashion a bizarre standard which would, not only violate fundamental notions of fair play, but would also violate sensible logic and basic human reasoning. This is not the intention or purpose of the Thirteenth Amendment. The Thirteenth Amendment proscribes a certain kind and type of conduct by public officials. The record does not reveal the force, compulsion or coercion necessary to support any such claims. Because of Brooks' failure to adduce any evidence at trial to support a claim under the Thirteenth Amendment, the Fifth Circuit correctly reversed and remanded this aspect of Brooks' claims.

That Brooks completely failed to present a case sufficient for the jury to consider is dramatically demonstrated by comparison to other cases. In Abbott v. Gould, Inc., 443 N.W.2d 591 (Neb. 1989), the court held it not to be involuntary servitude absent "the use or threat of physical force or legal coercion to extract labor from an unwilling worker." Id. at 596. There, employees claimed their employer intentionally deceived them into believing exposure to certain chemicals was not harmful when it actually was. The court rejected the plaintiffs' Thirteenth Amendment claim. Similarly, in United States v. Shackney, 333 F.2d 475 (2d Cir. 1964), the court held that an employer, who recruited Mexicans to work on his farm in Connecticut and threatened them unless they worked for an agreed period of time, was not guilty under a federal criminal statute incorporating the Thirteenth Amendment provisions. "While a credible threat of deportation may come close to the line, it still leaves the employee with a choice. . . ." Id. at 486.

The plaintiff in Turner v. Unification Church, 473 F.Supp. 367 (D.C. R.I. 1978), claimed that Reverend Moon induced her to join the church and then conspired to hold her in involuntary servitude. She alleged constant threats forced her to work more than 12 hours per day. The court rejected the plaintiff's claims saying, "It is unclear whether [18 U.S.C.] section 1853 should be expanded to include the type of involuntary servitude alleged in this case, namely psychological control or dominance over the servant. Involuntary servitude usually includes both elements of physical restraint and complete psychological domination." Id. at 375.

One vital, critical and essential element is lacking in the case presented by Brooks, as was present in Kozminski, supra, and Bell, supra. The record fails to reveal that Brooks did not desire to work, or that he refused or was unwilling to work, but was made to do so. Suppose, for example, Brooks had been in his cell early one morning and Sheriff Howell or one of his Deputies came to Brooks' cell to get him to work. Suppose further that Brooks, not willing to work, told the sheriff he would not work. Suppose further, the sheriff had advised Brooks that he could stay in his cell. (This is the feature of the case that, according to Brooks, triggers the Thirteenth Amendment violation.) Where does the compulsion arise? Where is it demonstrated? Had this very scenario occurred, which it did not, how could it be said that Brooks was compelled to do anything, except, possibly, remain in his cell?

Absent is any evidence that Sheriff Howell threatened to beat, kick, whip, kill or hurt Brooks to force him to work. There is no oral or documentary testimony or evidence which even intimates that the sheriff or any Respondent threatened

Brooks with isolation, administrative segregation, or to deny him food or water, or threatened a deprivation or punishment at all. Conspicuously silent from the record is any mention by any witness of any suggestion or innuendo to Brooks by one of the Respondents that, should he decline to work, he would suffer retribution, punishment or violence. The utter failure of the proof, including the absence of any coercion or compulsion, mandates that this Court deny Brooks' petition for writ of certiorari on the issue of whether the Fifth Circuit's opinion conflicts with an opinion of the Eighth Circuit or this Court.

II.

The Fifth Circuit Correctly Ruled That No Legitimately-Recognized Property Interest Protected By the Due Process Clause of the Fourteenth Amendment Exists for Consensual Work Performed on Private Property

The United States Constitution does not create property interests; consequently, Brooks must look to Mississippi law to determine whether a constitutionally-cognizable property interest in wages exists. Garcia v. Reeves County, Texas, 32 F.3d 200, 203 (5th Cir. 1994). The Mississippi Supreme Court had occasion to address this concept in Barrett v. Miller, 599 So.2d 559, 564 (Miss. 1992), wherein the court noted that 42 U.S.C. §1983 imposed liability "for the violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Id. at 564. The court continued by noting that the remedy for violation of a duty of care must be sought in state court under traditional tort law principles. Id. at

564. The court concluded by reiterating the following well-settled proposition:

> While liability may be assessed under §1983 when the limits of privileged force are exceeded, the threshold for that liability is higher than that set for a normal tort action. Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987). A mere lack of care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment and create liability under §1983.

Id. at 564. Simply put, if no federal rights are implicated, there is no basis for any action under 42 U.S.C. §1983. Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988)(a fundamental flaw often encountered is the assumption that a §1983 action may be based upon a violation of state law).

Brooks contended below that Miss. Code Ann. §47-1-13 (1972), provided the basis for his right to compensation for work on private property.[4] (R.Vol.VIp.1637). Along these lines, the lower court noted in its summary judgment opinion that Sheriff Howell had a

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[4]Brooks now cites Miss. Const. Art. 10 §226 in support of his position. Technically speaking, Brooks' contentions in this regard were not raised and/or argued at either the district court or Fifth Circuit level. As such, Brooks' arguments concerning any claim under the Mississippi Constitution for work performed on private property has been effectively waived or abandoned. Ellis v. Dixon, 75 S.Ct. 850, 852 (1955)(questions not raised in lower court proceedings were not open for consideration on petition for writ of certiorari).

statutory duty to keep a record of each prisoner and the days he worked, pursuant to Miss. Code Ann. §47-1-21 (Rev. 1993). (R.Vol.VIp.1634). Respondents submit that, even assuming Sheriff Howell violated the express terms of Miss. Code Ann. §47-1-13 (1972) and/or Miss. Code Ann. §47-1-21 (Rev. 1993), such violations do not establish or rise to the level of a constitutional deprivation, since neither statute allows and/or provides for a private cause of action. See, e.g., Davis v. Scherer, 104 S.Ct. 3012, 3018 (1984) (no legitimate property interest protected by the Fourteenth Amendment due process clause is created by state statute not providing for private avenue of redress). Couple that with the proposition that a violation of state law does not automatically amount to deprivation of a federal right, and it becomes readily apparent that Brooks failed to prove any constitutional transgression as a result of his working on private property based upon any possible violation of these statutes.

This aspect of Brooks' petition is further without merit in view of the fact that the due process clause of the Fourteenth Amendment is not implicated by a negligent or inadvertent act of an official which causes an unintended loss of or injury to life, liberty or property. Daniels v. Williams, 106 S.Ct. 662, 663 (1986). On the contrary, the focus of the due process clause is to curb deliberate abuses of government power.[5] Id. at 663. To hold that negligent inaction, inattention or acquiescence amounted to a constitutional deprivation within the meaning of

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[5]Sheriff Howell positively and unequivocally testified that he was not aware, at the time Brooks was working on private property, that such acts may violate state law. (R.Vol.IXp.473).

the Fourteenth Amendment would trivialize the centuries-old principle of due process of law. Id. at 667. Even "self-aggrandizing" or selfish motives are not actionable under the due process clause if no deliberate intent to harm exists. Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992). In other words, the admission of Sheriff Howell and his Deputies that Brooks worked on private property, at Brooks' own request, even if to enhance or bolster Respondents' own financial or personal gain, is not the kind of conduct the Fourteenth Amendment was designed to prevent. (R.Vol.IXp.473).

The evidence is uncontroverted that Sheriff Howell and his Deputies did not know that it may violate state law to allow inmates to work consensually on private property. (R.Vol.IXp.473). The evidence is equally undisputed that no one, at any time, forced Brooks to work or do anything other than stay in his cell to await his trial. Even assuming that Respondents committed some tort cognizable under state law, it does not rise to the level of a violation of the due process clause merely because Sheriff Howell and his Deputies were state officials. Baker v. McCollan, 99 S.Ct. 2689, 2695-96 (1979). The due process clause is simply not implicated by a state actor's unintended or negligent deprivation of a pretrial detainee's property interests. Davidson v. Cannon, 106 S.Ct. 668, 670 (1986). As such, many types of harm or injury, though caused by a state actor, do not fall within the scope of 42 U.S.C. §1983, inasmuch as §1983 "does not turn the Fourteenth Amendment into a font of tort law that supersedes the tort systems already available under individual state laws." Gregory v. City of Rogers, Arkansas, 974 F.2d 1006, 1009 (8th Cir. 1992). More importantly, the due process clause of the

Fourteenth Amendment is not implicated by the lack of due care of a public official causing an unintended injury to life, liberty or property.[6] Id. at 1009; Daniels, 106 S.Ct. at 663.

In each instance, Brooks' claims are premised solely upon state law and/or a state statute, none of which provide any implied private cause of action in Brooks, as correctly noted by the Fifth Circuit. Regardless of whether Sheriff Howell and/or his Deputies (1) failed to keep a record of each prisoner and the days he worked; or (2) failed to pay Brooks' wages for work performed on private property, these acts, even if true, do not give rise to a private cause of action in Brooks, and, in particular, no statute gives Brooks a "right" to be paid for working on private property. Even assuming there did exist some right to compensation for consensual work on private property under Miss. Code Ann. §47-1-13 (1972), the failure to pay Brooks on a few of the jobs he performed does not create a constitutional deprivation. That is, if Brooks had some right to be paid for those services he performed on private property, that right was not one secured by the Constitution or laws of the United States within the meaning of 42 U.S.C. §1983. Borror v. White, 377 F.Supp. 181, 183 (W.D. Va.

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[6]In order to state a substantive due process claim under the Fourteenth Amendment, the "official's action must be such that it 'shocks the conscience,' or 'offends the community's sense of fair play and decency.'" Porter v. City of Detroit, 639 F.Supp. 589, 593 (E.D. Mich. 1986); see also, Rochin v. California, 72 S.Ct. 205 (1952). That is, only conduct which is clearly "outrageous" invokes the protections afforded by the due process clause. No act of Sheriff Howell or his Deputies amounts to shocking conduct, nor is it so patently offensive as to amount to a substantive due process deprivation under the Constitution, as the Fifth Circuit correctly held.

1974)(petitioner's right to payment for his services as barber was derived from the laws of the state of Virginia, and was not a right secured by the Constitution).

In order to rise to the level of a constitutional claim, the conduct of the public official or employee must be "sufficiently egregious as to be constitutionally tortious." Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982)(§1983 imposes liability for violation of rights protected by the Constitution, not for violations of state tort or statutory law). Allowing a pretrial detainee to work on private property is patently innocuous from a constitutional standpoint and is, at most, a mere violation of state law. Clearly, no important question of federal law is involved in this aspect of Brooks' petition for writ of certiorari.

III.

The Fifth Circuit Correctly Held That Sheriff Howell Had No Duty Under Mississippi Law to Periodically Ascertain Brooks' Status as a Pretrial Detainee

Brooks contends that the Fifth Circuit incorrectly ruled that Sheriff Howell had no duty under state law to ascertain Brooks' status as a pretrial detainee, and that this is supposedly an "important question of federal law." (Pet. at 16). Specifically, Brooks contends that Miss. Code Ann. §47-1-21 (Rev. 1993), allegedly requires that Sheriff Howell "present for approval for hiring a pretrial detainee to the board of supervisors of the county," and that a review of Brooks' file for this purpose would have revealed the dismissal of all charges. (Pet. at 16). In addition, Brooks maintains that Sheriff Howell and his Deputies had a duty to determine whether his criminal

charges had been dismissed, even though not dismissed in open court in George County. Contrary to Brooks' protestations, none of the Respondents had any duty to periodically ascertain or verify his status as a pretrial detainee under Mississippi law.

The Fifth Circuit recently clarified the continuing "duty" owed to inmates who were initially incarcerated pursuant to a valid capias or warrant in the case of Duckett v. City of Cedar Park, Texas, 950 F.2d 272 (5th Cir. 1992). There, the Fifth Circuit stated that a police officer who arrests and incarcerates someone pursuant to a valid warrant acted reasonably, even it is later determined that the arrest was improper. Id. at 280. More importantly, the court continued by noting that a law enforcement official was under no duty to release an inmate from confinement unless he ascertained **"beyond a reasonable doubt"** that the inmate should no longer be confined. Id. at 279. Only by being notified of the entry of the order of dismissal could these Respondents have known "beyond a reasonable doubt" that Brooks should have been released.

In this case, Sheriff Howell and his Deputies lawfully, properly and rightfully incarcerated Brooks in the George County jail pursuant to a valid capias and indictment on two felony charges. There is simply no dispute about this. (R.Vol.VIp.1580-1582; Vol.IXp.430). Unlike the situation in Baker v. McCollan, 99 S.Ct. 2689 (1979), no claim of innocence was ever made by Brooks.[7] Furthermore, there was

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[7]The public policy considerations for imposing a duty to "independently investigate" in a factual scenario like Baker are greater than they are in the instant case. There, the sheriff had some notice of possible wrongful detention

no constitutional duty to "investigate independently" the possibility of an order of dismissal. Because Sheriff Howell and his Deputies were under no legal or constitutional duty to determine whether an order of nolle prosequi existed, or to routinely, regularly, or even occasionally survey and examine the records of the Circuit Clerk of George County, Brooks' claim in this regard must fail, and the Fifth Circuit properly affirmed the district court's granting of summary judgment in this respect. Nevertheless, even assuming that a duty were imposed upon Sheriff Howell and his Deputies to make themselves aware of the entry of the nolle prosequi order, their failure to discover the existence of the order is tantamount to nothing more than simple negligence. Simple negligence, as previously discussed, does not give rise to a constitutional claim as a matter of law.

Brooks contends that the Fifth Circuit's reliance on Valencia v. Wiggins, 981 F.2d 1440, 1449 (5th Cir. 1993), is allegedly contrary to this Court's prior pronouncements in California v. Hodari, 111 S.Ct. 1547 (1991), U.S. v. Mendenhall, 100 S.Ct. 1870 (1980), and Terry v. Ohio, 88 S.Ct. 1868 (1968). Brooks' contentions aside, Hodari, Mendenhall and Terry are not relevant to any issue before the Fifth Circuit or this Court since there was no dispute below concerning Brooks' initial arrest and incarceration under the Fourth Amendment. Both Hodari and Mendenhall involved questions concerning the claimant's arrest and initial seizure, while Terry addressed the issue of whether a law enforcement

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due to the plaintiff's loud protestations of innocence. Here, Brooks never claimed that he was innocent and remained totally silent (and ignorant) about the nolle prosequi order.

officer was permitted to conduct a physical search of a person for weapons when the officer had reasonable suspicion to believe the detainee may be armed. Hodari, 111 S.Ct. at 1550; Mendenhall, 100 S.Ct. at 1877; Terry, 88 S.Ct. at 1877-78.

To argue that Sheriff Howell and his Deputies had a duty to regularly or routinely inspect the records of the Circuit Clerk leads to the absurd. Such a duty would require a tremendous amount of time and manpower.[8] It would require Sheriff Howell and his Deputies to read and comprehend all court orders, some of which employ Latin phrases not of common understanding, and may be subject to the lay interpretation of Sheriff Howell and his Deputies. More importantly, should Sheriff Howell and his Deputies misunderstand the substance of an order and mistakenly release a dangerous inmate, they could be subjected to a criminal sanction or independent tort liability. Miss. Code Ann. §97-9-37 (Supp. 1996).

Based on the foregoing, Sheriff Howell and his Deputies respectfully submit that the Fifth Circuit properly rejected Brooks' claims concerning some non-existent duty allegedly imposed upon Sheriff Howell and/or his Deputies.

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[8]Suppose, for example, that Sheriff Howell and/or his deputies were required to independently learn of the existence of all orders of dismissal. Under Brooks' analysis, a daily inspection would be required, since the moment judicial authorization for an inmate's incarceration ceased to exist that inmate would, according to Brooks, no longer be lawfully confined, thereby purportedly subjecting the public official to liability under 42 U.S.C. §1983 and state tort law. This is simply not the law in Mississippi, and neither Sheriff Howell nor his Deputies were under any duty or obligation to conduct the routine review of court records that Brooks contends was required.

Conclusion

For all of the foregoing reasons, Respondents submit that Brooks' petition for writ of certiorari should be denied.

Respectfully submitted,

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